

NOT FOR PUBLICATION

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE TENTH CIRCUIT**

IN RE LOG FURNITURE, INC.,
Debtor.

BAP No. UT-06-050
BAP No. UT-06-051

CARI ALLEN,
Appellant,

Bankr. No. 03C-38622
Chapter 7

v.

ORDER AND JUDGMENT*

ELIZABETH R. LOVERIDGE,
Trustee, GOLDEN MEADOWS
PROPERTIES, LLC, and NUPETCO
ASSOCIATES,

Appellees.

Appeal from the United States Bankruptcy Court
for the District of Utah

Before NUGENT, McNIFF, and BERGER¹, Bankruptcy Judges.

McNIFF, Bankruptcy Judge.

Cari Allen (“Allen”) timely appeals the bankruptcy court’s November 28, 2005 Order Approving Settlement Agreement and May 5, 2006 Order Denying Motion for New Trial to Alter and Amend or Vacate and Set Aside Judgment (collectively “Order Approving Settlement”) and the May 8, 2006 Order

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

¹ Honorable Robert D. Berger, United States Bankruptcy Judge, United States Bankruptcy Court for the District of Kansas, sitting by designation.

Disallowing Claims. Finding no error, we affirm.

I. Jurisdiction and Standard of Review

Allen filed timely Notices of Appeal and no party has elected to have the appeal heard by the United States District Court for the District of Utah. Therefore, this Court has jurisdiction over the appeals. 28 U.S.C. § 158 (a)(1), (b)-(c); Fed. R. Bankr. P. Rule [Interim] 8001 (a) & (e); Fed. R. Bankr. P. 8002 (a); 10th Cir. BAP L.R. 8001-1. A bankruptcy court’s order approving a compromise and settlement is reviewed for abuse of discretion. *Reiss v. Haggmann*, 881 F.2d 890, 891-92 (10th Cir. 1989). The issue of whether claims were subsumed into a settlement agreement is a question of fact. Under those circumstances, we review the Order Disallowing Claims for clear error. *Phillips v. White (In re White)*, 25 F.3d 931, 933 (10th Cir. 1994).

II. Background

Elizabeth Loveridge is the Chapter 7 Trustee (“Trustee”) of the estate of the Debtor, Log Furniture, Inc. (“Log Furniture”). Nupetco Associates (“Nupetco”) and Golden Meadows Properties, LC (“Golden Meadows”) are creditors of Log Furniture. Neuman Petty (“Petty”) is a principal of Nupetco and Golden Meadows (collectively “Creditors”). Allen is a former principal of Log Furniture.

Settlement Agreement

In October 2005, the Trustee entered into a Settlement Agreement with the Creditors. The Settlement Agreement resolved three pending disputes: an adversary proceeding in which the Trustee was seeking to set aside a prepetition assignment to Nupetco of claims for relief Log Furniture was litigating against its landlord, Depot Associates LLC (“Depot Associates”); the claims the estate was asserting against Petty; and the validity of Nupetco’s asserted lien on \$53,980.69 of auction proceeds the Trustee obtained by liquidating Log Furniture’s equipment and inventory. In addition to Nupetco’s secured claim of \$551,073.43,

the Internal Revenue Service and two Utah state taxing authorities had filed liens on all of the bankruptcy estate's property, including the auction proceeds.

Under the Settlement Agreement, the Trustee agreed to pay the Creditors \$29,980.69 from the auction proceeds. In return, the Creditors agreed to release their liens on the remaining auction proceeds (\$24,000.00) and to accept the funds paid to them in full satisfaction of their claims against the estate. The Trustee also agreed to: abandon unliquidated equipment and inventory and intellectual property assets; dismiss the adversary proceeding; transfer the claims for relief against Depot Associates to the Creditors, subject to the tax liens; and release Petty from any claims the estate may have against him.

On October 5, 2005, the Trustee filed a Motion to Approve Settlement Agreement ("Trustee's Motion"). The Trustee's Motion and a Notice of Hearing were served on Allen, among others. Allen filed an objection and appeared at the hearing held on October 26, 2005.

At the hearing, the Trustee proffered testimony to establish: the remaining unsold equipment had a value of no more than \$10,000 and Depot Associates claimed ownership of those items; all personal property of the estate was encumbered by Nupetco's lien; the claims for relief against Depot Associates were encumbered by liens of taxing authorities exceeding \$300,000; although Nupetco had valid defenses to the adversary proceeding, if the Trustee prevailed she would still have to be successful in the Depot Associates litigation to enhance the estate; the wrongful eviction claims against Depot Associates were of questionable value because Log Furniture was in monetary default under the lease when the eviction occurred; and the Trustee had no funds to continue the litigation against Depot Associates or Nupetco, both cases involving extensive discovery and estimated attorney's fees exceeding \$50,000.00.

The Trustee also proffered the testimony of an accountant. The Trustee based her assessment of damages in the Depot Associates litigation on the

accountant's report. The accountant concluded Log Furniture's damage assessment was inflated and could not be corroborated because of erroneous and unreliable records.

Allen argued against approval of the Settlement Agreement based on her optimistic assessment of the claims for relief against Depot Associates. She contended the estate would be able to pay the unsecured creditors if the Trustee pursued the litigation. Allen did not object to the Trustee's proffered testimony and did not introduce any evidence in support of the allegations in her objection to the Trustee's Motion.

The bankruptcy court made cursory findings and conclusions. On the record, the bankruptcy court accepted the Trustee's proffered testimony, unchallenged by Allen, as support for approval of the Settlement Agreement. In the Order Approving Settlement, the bankruptcy court refused to authorize an abandonment of the intellectual property assets and required that the remaining equipment be abandoned only pursuant to 11 U.S.C. § 554. On December 7, 2005, Allen filed a Motion for a New Trial and to Alter and Amend or Vacate and Set Aside Judgment ("Motion for New Trial").

Claims Objections

At the time the Settlement Agreement was approved, Golden Meadows and Nupetco had proofs of claim on file, no. 21 and no. 55, respectively. On February 9, 2006, they filed amended proofs of claim, no. 56 and no. 57. On February 14, 2006, Allen filed an Objection to Proof of Claim of Nupetco Associates (Claim #57) and Golden Meadows (Claim #56) ("Objection to Claims").

Allen's objection was brought under Federal Rule of Bankruptcy Procedure 3001(d). She alleged the amended claims were undocumented, failed to provide an accounting of a deficiency calculation, were false, and were filed after the approval of the Settlement Agreement.

The bankruptcy court held a hearing on the Objection to Claims. Nupetco

and Golden Meadows appeared and indicated they had no claim against the estate due to the Settlement Agreement. The Creditors agreed their claims should be disallowed. Allen argued that the amended claims mooted the prior claims (claims no. 21 and no. 55) upon which the Settlement Agreement was based, and therefore, the Settlement Agreement was invalid. Allen asked the bankruptcy court to disallow all of the proofs of claim filed by Nupetco and Golden Meadows.

The bankruptcy court agreed to disallow the claims. On May 8, 2006, the bankruptcy court entered its Order Disallowing Claims, finding that claims no. 21 and no. 55 were subsumed into the court-approved Settlement Agreement and that the claimants had no objection to the disallowance of claims no. 56 and no. 57. The Order Disallowing Claims specifically ruled that the order did not modify the Order Approving Settlement. Allen timely appealed.

The Motion for New Trial

On March 31, 2006, the bankruptcy court held a hearing on Allen's Motion for a New Trial. Allen contended that a change in circumstance, the subsequent disallowance of claims no. 21 and no. 55 upon which the Settlement Agreement was based, required that the court vacate the Order Approving Settlement. The bankruptcy court denied the Motion for a New Trial. Allen timely appealed that order also. This Order and Judgment will address both of Appellant's appeals.

III. Discussion

In approving the Settlement Agreement, the bankruptcy court applied the standards set forth in the case of *In re Kopexa Realty Venture Co.*, 213 B.R. 1020 (10th Cir. BAP 1997). The decision to approve a settlement must be "an informed one based upon an objective evaluation of developed facts." *Id.* at 1022 (citing *Reiss v. Hagmann*, 881 F.2d at 892). Factors to consider are "the probable success of the underlying litigation on the merits, the possible difficulty in collection of a judgment, the complexity and expense of the litigation, and the

interest of creditors in deference of their reasonable views.” *In re Kopexa*, 213 B.R. at 1022.

The bankruptcy court did not abuse its discretion in approving the compromise and settlement. The Settlement Agreement encompassed a resolution of several disputes. The only evidence before the bankruptcy court established that the likelihood of the Trustee prevailing on the merits of the Depot Associates litigation was small due to Log Furniture’s monetary default under its lease, and the cost of pursuing the litigation was expected to far surpass the estate’s assets. The evidence established that the property of the estate, including the auction proceeds, was fully encumbered by valid liens of Nupetco and the various taxing authorities. The unsecured creditors would not receive benefit from the costly litigation unless the Trustee were to recover sufficient funds to satisfy the tax claims encumbering the property.

Allen argued throughout her pleadings and before this Court that the Trustee failed to perform her statutory duty to properly investigate the facts surrounding the Depot Associates litigation, and that the Settlement Agreement was based on fraud, conspiracy, and the Trustee’s self interest. Allen contends the claims for relief against Depot Associates, if pursued, could satisfy the claims of the unsecured creditors of the estate. Yet, Allen introduced no evidence to support her contentions and took no steps to refute or discredit the Trustee’s evidence.

Allen also argues that property of the estate should not be abandoned. The bankruptcy court agreed with her in part, and ordered that the Trustee could only abandon assets to the Debtor (not the Creditors). The bankruptcy court also refused to authorize the abandonment of the intellectual property assets.

This Court believes Allen does not fully understand the bankruptcy court’s ruling on the abandonment issue. Also, the evidence showed the abandoned assets were of little value and were subject to competing ownership claims. The

bankruptcy court's decision regarding the abandonment of assets was not an abuse of discretion.

Allen also contends the Trustee's Notice of the Motion to Approve Compromise and Settlement was not served on all parties in interest and, therefore, did not provide adequate procedural due process. The Trustee's certificate of service attached to her Notice, although ambiguous, indicates service to the "mailing matrix" and others. The notice was proper under Federal Rules of Bankruptcy Procedure 9019 and 2002(a)(3). Regardless, Allen failed to raise this argument in the bankruptcy court. This Court will not consider an argument raised for the first time on appeal. *Sender v. Johnson (In re Hedged-Invs. Assocs., Inc.)*, 84 F.3d 1267, 1271 n.3 (10th Cir. 1996).

Allen also appealed the Order Disallowing Claims. Because the bankruptcy court disallowed the claims as Allen requested, her appeal goes not to the result but apparently to the bankruptcy court's underlying reasoning. Allen complains the bankruptcy court should have vacated the Order Approving Settlement because the Settlement Agreement had no basis in fact or law once the underlying claims no. 21 and no. 55 were disallowed.

Allen's argument is simply a restatement of her displeasure with the bankruptcy court's approval of the Settlement Agreement. The Creditors conceded the claims should be disallowed. The Creditors' action, taken in compliance with the court-approved Settlement Agreement, does not constitute grounds for a subsequent order invalidating that very approval. No controversy was even before the bankruptcy court, and the bankruptcy court's conclusion that claims no. 21 and no. 55 were subsumed into the Settlement Agreement was not erroneous.

IV. Conclusion

The bankruptcy court's decisions were not in error. The Order Approving Settlement and the Order Disallowing Claims are AFFIRMED.